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violates both federal and state law, the double jeopardy provision of the Fifth Amendment has been construed as not preventing a federal prosecution after a defendant has been acquitted of the same misconduct by a state court under state law.[39] It is at least arguable that in some situations res judicata could be invoked to prevent prosecutions by more than one jurisdiction for the same offense.

Res judicata is a particularly desirable limitation in the conspiracy field. While the conspiracy statute has been of unquestioned value to federal law enforcement agencies, it presents the continual temptation to harass a defendant with multiple prosecutions. Res judicata may not prevent all abuse of the conspiracy theory,[40] but it will limit the situations in which a prosecutor can retry a defendant for the same misconduct simply by shifting the labels.

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Evidence of Bad Reputation in Liquor Law Prosecution

The Supreme Court of Arkansas has recently approved a conviction for violation of the state liquor laws which was based in part upon the state's affirmative evidence of defendant's bad reputation as a liquor seller. In *Richardson* v. *State*,[1] the reputation evidence which was used in the prosecution of the defendant for selling liquor on Sunday was ad-

held that an acquittal of one murder would not bar a conviction of the other; although argued in defendant's brief, court did not mention res judicata in its opinion).

39 *United States* v. *Lanza*, 260 U. S. 377 (1922); Comment (1947) 38 J. of Crim. L. & Criminology, 379, 380. The court by applying res judicata instead of double jeopardy keeps the question out of the constitutional realm and avoids the problem presented by the belief of the minority of the Court that the Bill of Rights gives protection against state as well as federal action, via the due process clause of the 14th Amendment. See the various opinions in *Adamson* v. *California*, 332 U. S. 46 (1947); *Bute* v. *Illinois*, 333 U. S. 640 for recent illustrations of the division on the present Court concerning the applicability of the specific guarantees of the federal Bill of Rights to the states. Mr. Justice Douglas, who wrote the *Sealfon* opinion, sided with the minority in the *Adamson* case.

40 Report of Attorney General (1925) 5-6. It contained the opinions and recommendations of the Senior Circuit Judges in connection with the doctrine. "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused. Although in a particular case there may be no preconcert of plan, excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; yet the theory which permits us to call the aborted plan a greater offense than the completed crime supposes a serious and substantially continued group scheme for cooperative lawbreaking. We observe so many conspiracy prosecutions which do not have this substantial basis that we fear the creation of a general impression, very harmful to law enforcement, that this method of prosecution is used arbitrarily and harshly. Further the rules of evidence in conspiracy cases make them very hard to try without prejudice to the innocent defendant." They recommended that the matter be called to the attention of the district attorneys "to the end that this form of indictment be hereafter not adopted hastily but only after a careful conclusion that the public interest so requires . . ."

The Court could exercise the supervisory power which it has over the lower federal courts as indicated in *McNabb* v. *United States*, 318 U. S. 332 (1943). *But see* the answer of the court in *Westfall* v. *United States*, 20 F. (2d) 604 (C. C. A. 6th, 1927).

1—Ark.—, 204 S.W. (2d) 477 (1947).

mitted by virtue of an Arkansas Statute[2] providing for the admissibility, in liquor law violation cases, of evidence of "the general reputation of the defendant for bootlegging." The only other evidence of the defendant's guilt was the incriminating testimony of an accomplice as to the particular charge against the defendant.[3] Since the offense for which Richardson was prosecuted was a misdemeanor, his conviction could, under a state statute,[4] have been based on the testimony of the one accomplice alone.[5]

The defendant argued that the statute under which he was prosecuted did not permit the use of the reputation evidence,[6] but despite a somewhat obscure history which would have permitted another construction, the court construed the statute as authorizing the admission of such evidence.[7] The court held, however, that in order to meet possible due

2 Ark. Acts 1943, Act 257, §2, Pope's Digest §14140.

3 204 S.W. (2d) at p. 478.

4 Ark. Acts 1935, Act 108, Art. VI, §7, Pope's Digest §14140: "In any action for violation of this chapter, the general reputation of the defendant for bootlegging or being engaged in selling, or trading in, alcoholic beverages, or keeping or transporting them for sale, shall be admissible in evidence against him."

This section of the statute has been applied in several cases where the charge was possessing liquor for sale, Harris v. City of Harrison, ——Ark.——, 204 S.W. (2d) 167 (1947); Hughes v. State, 209 Ark. 125, 189 S.W. (2d) 713 (1945); Marshall v. State, 205 Ark. XIX, 168 S.W. (2d) 809 (1943); Casteel v. State, 151 Ark. 69, 235 S.W. 386 (1921); and Craig v. State, 204 Ark. 798, 164 S.W. (2d) 1007 (1942); and where the testimony concerning reputation was that of prior convictions, Burrell v. State, 203 Ark. 1124, 160 S.W. (2d) 218 (1942). In at least two of the cases the court determined the admissibility on the grounds that it showed the nature of the business in which the defendant was participating, Marshall v. State and Casteel v. State *supra*.

5 Defendant argued that it is well settled law in the state that evidence of an accomplice must be corroborated, and that the evidence of the accomplice here was corroborated only by the allegedly improper reputation evidence. The court held, however, that under §4017 of Pope's Digest, §2554 of Kirby and Castle's Digest, "The requirement of corroboration is not only confined to felony cases, but it is further provided that a conviction may be had upon the testimony of an accomplice, alone, in misdemeanor cases." ——Ark.——, 204 S.W. (2d) 477, 478 (1947).

Use of the testimony of the accomplice was particularly onerous in the *Richardson* case because it was inconsistent with his prior statements.

Generally, the testimony of an accomplice is not accepted without question. Courts usually require either that it be corroborated, People v. Hamilton, ——Cal.——, 188 P. (2d) 817 (1948); People v. Parker, 80 Cal. App. (2d) ——, 181 P. (2d) 16, 19 (1947), or that it itself be clear and convincing, People v. Dennis Kelly, 380 Ill. 589, 44 N.E. (2d) 563, 313 Ill. App. 260 (1942); People v. Parker, 310 Ill. App. 307, 34 N.E. (2d) 110 (1941).

6 The Act under which the evidence of the defendant's reputation was admitted is the state's general local option prohibition law, and the evidentiary provision therein applies to every violation of the act. See note 4, *supra*.

The section of the general act pertaining to the violation of selling on Sunday had been amended and subsequently a new act, Ark. Acts, 1943, Act 257, had been passed, expressly repealing all laws and parts of laws in conflict with it. Defendant argued that the act under which the prosecution was brought was a new act, and that therefore the reputation evidence authorization did not apply. Ark. Acts, 1943, Act 257, p. 551; Pope's Digest, 1944 Ann. Supp., p. 902: "§3, This Act shall not be construed to repeal any law with respect to the sale of intoxicating liquors except to minors and on Sundays; and all laws and parts of laws in conflict herewith are repealed."

7 The court set out the history of the statute as follows: "By Article VI, §1 (b), Act 108 of 1935, the sale of intoxicating liquor on Sunday was made a misdemeanor and punishment for the initial violation is the same as that under which the appellant was convicted. This sub-section of the 1935 Act was amended by §1 (b) of Act 356 of 1941 to make the offense of selling liquor on Sunday a felony. The 1941 Act was repealed by Act 257 of 1943, which is virtually a re-enactment of Art. VI, §1 (b),

process objections, the reputation evidence must be corroborated by other testimony. "We therefore construe the statute to mean," the court said, "that proof of recent reputation for engaging in the illegal sale of intoxicating liquors is competent proof thereof, but insufficient to sustain a conviction, unless corroborated by other substantial evidence which tends to establish the guilt of the accused. When thus restricted in its application, we think the statute comes within the constitutional powers of the Legislature."[8]

In the absence of statute the reputation evidence admitted in the *Richardson* case would have been excluded under the hearsay rule—because a witness, when testifying concerning defendant's reputation, in effect reports the opinions of others who are not available for cross-examination, and these opinions are relied upon as being true to establish defendant's guilt. At common law ever since the formulation of the hearsay rule in the early eighteenth century, admission of evidence of general reputation has been restricted to four exceptions: land-boundaries and land-customary rights and verdicts in other litigation, events of general history, marriage and other facts of family history, and personal character.[9] In respect to the last of these, at common law today the prosecution is not entitled to introduce evidence of defendant's bad character except to rebut evidence introduced by defendant to establish his good character, or to impeach defendant's credibility as a witness if he has testified in his own behalf.[10] Moreover, there are two types of reputation evidence which generally are not considered hearsay at all: where the reputation is part of the issue of the case, and where it is valid circumstantial evidence.[11] The evidence in the *Richardson* case was not admit-

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Act 108 of 1935, in so far as the sale of intoxicating liquor on Sunday is concerned." ———Ark.——, 204 S.W. (2d) 477, 478.

The court held that because of the history of the section, "The instant proceeding should be construed as one for a violation of Act 108 of 1935, as amended by subsequent legislation on the subject." *Ibid.*

8 Id. at 478-479. The court said that if criminality were predicated upon such proof it would violate the due process clauses of the Arkansas Constitution, Art. II, §8, and the United States Constitution, Amend. XIV, §1. *Cf.* Hughes v. State, 29 Ohio CC. 237 (1907); and Hammond v. State, 780 Ohio St. 15, 84 N.E. 416 (1908).

9 5 Wigmore, Evidence (3d ed. 1940) §1580. These exceptions are founded on the familiar bases of necessity and the assurance of trustworthiness provided by the circumstances. Comment (1947) 42 Ill. L. Rev. 88, 91.

10 1 Wigmore, Evidence (3d ed. 1940) §§55-58. Contrary to most "habitual criminal" statutes, the Illinois Act allows evidence of prior convictions to be read in evidence before the jury retires, if the accused is being prosecuted as an habitual criminal (Ill. Rev. Stat. (1947) c. 38, §602); this is contrary to the common law rule against admitting evidence of prior acts of misconduct, which is based upon the principles of prevention of prejudicing the jury and of not forcing defendant to defend against actions of which he has no prior notice, as stated in terms of surprise to the defendant.

11 5 Wigmore, *op. cit. supra* note 9, §§ 1609, 1620. In these situations the evidence is not considered to be hearsay because reliance is not placed on their being true in themselves. *Cf.* McCormick, The Scope of Privilege in the Law of Evidence (1938) 16 Tex. L. Rev. 447.

Where the reputation of the plaintiff is an issue in mitigation of damages in defamation cases, that reputation is part of the issue in the case.

Evidence of reputation is evidentially circumstantial, for example, where, from the general reputation of an agent or employee, there is inferred knowledge thereof by his principal or employer in cases of respondeat superior or negligent selection of employees. Comment (1947) 42 Ill. L. Rev. 88.

Between the two classifications lie the offenses of being a common offender or of keeping a common nuisance, in criminal cases. 5 Wigmore, Evidence (11th ed. 1935) §§481-482. See also notes 17, 18, and 19, *infra.*

ted as an exception to the hearsay rule, nor was it admitted to rebut an assertion of good character; it was not a part of the issue of the case, nor was it valid circumstantial evidence. It was admitted simply to prove the guilt of the defendant, and if corroborated it might sustain a conviction. It is, therefore, the clearest kind of hearsay and hence admissible only by virtue of the statute.

A legislature, of course, has power to change the rules of evidence and to modify substantive law, even under the guise of changing the rules of evidence, but is subject to limitations imposed by the state and federal constitutions.[12] In construing a statute which purports to change a rule of evidence and in determining whether it exceeds the legislative powers, it should be analyzed from two points of view: (1) limitations upon the power of the legislature which may be imposed by the nature of the evidence itself; and (2) limitations upon the power of the legislature to determine the *weight* which shall be given to the evidence.

Although courts recognize the power of the legislature to change technical rules of law, they treat hearsay evidence, because of its very nature, as something more than a mere technicality.[13] No cases have held that the use of hearsay is necessarily unconstitutional, but several recent opinions have indicated that in some circumstances the use of particular types of unreliable hearsay might amount to a denial of due process of law.[14]

12 The power of the legislature is circumscribed by restrictions caused by constitutional sanctions such as the privilege against self-incrimination, the accused's right to confrontation, the rule requiring two witnesses in treason cases, and the right of testifying without regard to defects of theological belief. 1 Wigmore (3d ed. 1940) §7. A further restriction has been seen in the constitutional theory of separation of powers in that if the statute prohibits the court from investigating into the facts by saying, for example, that certain evidence shall be conclusive of guilt, it will constitute an unconstitutional invasion of the judicial function. *Ibid.* Hughes v. State, 29 Ohio C.C. 237 (1907); and Hammond v. State, 780 Ohio St. 15, 84 N.E. 416 (1908), cited *supra* note 7.

If the statute is so indefinite as to permit the jury to determine the nature of the crime charged, it is unconstitutional. People v. Licavoli, 264 Mich. 643, 250 N.W. 520 (1933); Musser v. Utah, 333 U.S. 95 (1948).

If the rule prescribed involves a property right which is protected by the U. S. Constitution, and is thus a change in substantive law although expressed in terms of a rule of evidence, it may be unconstitutional if it violates that right. Wigmore *op. cit. supra* §7.

13 In reviewing decisions by administrative agencies, even though the statutes provide that the administrative agency shall not be limited by common law or statutory rules of evidence, some courts have held that decisions cannot be based on hearsay alone. In Carroll v. Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (1916) and Matter of Altschuller v. Bressler, 289 N. Y. 463, 46 N.E. (2d) 886 (1943), the court held that there must be a "residuum of legal evidence" upon which an award may be based. *Cf.* Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 A. 246 (1930); Brewerton Coal Co. v. Industrial Commission, 324 Ill. 89, 154 N.E. 412 (1927); Note (1943) 42 Mich. L. Rev. 154. See Dodd, Administration of Workmen's Compensation, note 15 *infra*.

14 In Bridges v. Wixon, 326 U. S. 135, 151 (1945) hearsay statements admitted as substantive evidence in the lower court were held to be error because it would allow men to be convicted on unsworn testimony of witnesses, and also because it was contrary to the administrative rules and "counter to the notions of fairness upon which our legal system is founded." Deportation order reversed.

In Application of Yamashita, 327 U. S. 1 (1946), where hearsay evidence was admitted by the military commission which tried the case, the Court held that the guarantees of due process did not apply to cases under that tribunal. Mr. Justice Rutledge, joined by Mr. Justice Murphy, dissented because they deemed the whole proceeding contrary to the standards of fairness required by due process. They particularly criticized the use of ex parte affidavits and other hearsay evidence. Comment (1946) 40 Ill. L. Rev. 546; Comment (1946) 59 Harvard L. Rev. 832.

Reputation evidence would seem to be particularly questionable because of the common law experience that such evidence cannot be properly evaluated by a jury, is not necessarily relevant to the defendant's guilt of a particular crime, places defendant on trial for prior acts of misconduct which makes his defense difficult because of multiplicity of issues and surprise, and is subject to abuse because of the facility of faking it.[15] Moreover, the use of such evidence might frequently work an undue hardship on those defendants who, because of their social and economic situations, are least able adequately to defend themselves. On the other hand, some courts, recognizing the extraordinary difficulty of enforcement, have sustained statutes authorizing the use of reputation evidence in the prosecution of such types of crimes as prostitution,[17] bootlegging,[18] and vagrancy.[19]

Where a statute makes evidence of the defendant's bad reputation admissible, the courts face the further problem of the weight to be given such evidence. In the *Richardson* case, the statute[20] merely declared that such evidence should be admissible without indicating the effect which should be given to it. As already indicated, the Supreme Court of Arkansas, in order to avoid constitutional doubts, read into the statute a requirement that the evidence be corroborated by other competent evidence. The court would seem to have avoided two possible constructions which would have been more favorable to defendant. By taking the statute at its face value, it could have construed such evidence as merely admissible and could have imposed upon the trial court the duty in each instance of scrutinizing all of the evidence to determine whether the prosecution's case is sufficient to go to the jury. Or the court could have required that the corroborating evidence, in addition to being competent, should be clear and convincing.[21] In effect, however, the *Richardson* case held that evidence of a defendant's reputation for illegally selling liquor if corroborated at all is prima facie[22] proof of his guilt in the sense that it is sufficient to take the case to the jury.

Unlike the statute involved in the *Richardson* case, most legislation authorizing the use of evidence of defendant's bad reputation indicates the weight to be given to such evidence by providing that it shall be prima facie proof of guilt. Typical of such legislation are "Public Enemy Statutes" which have been adopted by five states.[23] In the leading case

15 James, The Role of Hearsay in a Rational Scheme of Evidence (1940) 34 Ill. L. Rev. 788. Dodd, Administration of Workmen's Compensation (1936) Commonwealth Fund 227-236, sets out three grounds upon which hearsay is usually excluded: (1) because it is irrelevant; (2) because it cannot properly be evaluated by a common law jury; (3) because some evidence is so difficult to meet and rebut that its use is unfair; suggests that the most rational ground is the principle of the best evidence rule.

16 *Cf.* Skinner v. Oklahoma, 316 U. S. 535 (1942).

17 5 Wigmore, Evidence (3d ed. 1940) §§1580-1626.

18 *Ibid.*; 1 Wigmore *op. cit. supra* note 10.

19 Note 23 *infra.*

20 Note 4 *supra.*

21 Note 3 *supra.*

22 The phrases "prima facie" and "presumption", and the variety of meanings thereof are discussed in: McCormick, Charges on Presumptions and Burden of Proof (1927) 5 N. C. L. Rev. 291, 295; Chamberlain, Presumptions as First Aid to the District Attorney (1928) 14 A. B. A. J. 287; Morgan, Constitutional Limitations on Presumptions Created by State Legislatures (1934) Harvard Legal Essays 323; Note (1943) 56 Harvard L. Rev. 1324-1330; Note (1943) 17 So. Calif. L. Rev. 48-53.

23 As a result of increased activity of professional criminals, and because of the desire to provide prophylactic measures rather than wait for conviction until a crime

of *People* v. *Licavoli*,[24] a Michigan "Public Enemy Statute"[25] made the defedant's reputation for engaging in illegal occupation or business prima facie evidence of being so engaged. In a four to three decision the court construed the statute as providing that, in absence of refutation by the defendant, the bad reputation alone would be sufficient to justify conviction; hence the statute, in removing the presumption of innocence, constituted a denial of due process of law. A minority of the court dissented on the grounds that the statute could and should be construed in such a way as to render it valid. Urging a construction similar to that of the *Richardson* case, the dissenters argued that the statute should be interpreted to mean that the evidence is competent proof of engaging in illegal occupation or business, but not sufficient to sustain a conviction unless corroborated by other competent evidence.[26]

Although apparently no attempt has been made to take the *Richardson* case before the United States Supreme Court, it is interesting to speculate on the view the Court would take in such a case. The statute in the

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has occurred, six states (South Dakota, New Jersey, Rhode Island, New York, Illinois, and Michigan) have expanded their "vagrancy acts" into "public enemy acts", generally by including in the definition of "vagrants" those persons who associate with criminals or those who have specified undesirable reputations.

All 48 states have enacted "vagrancy acts", the purpose of which is to clear the streets of persons who loiter about without visible means of support. See Law Revision Commission Report (New York 1935), Recommendations and Study Made in Relation to a Public Enemy Law for New York, 623.

Compare People v. Piere, 269 N. Y. 315, 199 N.E. 495 (1936) (statute said that a person (1) of bad reputation, (2) in close association with criminals, (3) for an unlawful purpose and with intent to breach the peace, was guilty of a crime; held to adequately define the crime and to have rational connection with it sufficient to be constitutional); Lanzetta v. New Jersey, 306 U. S. 451 (1939) (statute making it a crime to be a member of a "gang" held to violate due process for lack of definiteness); Hallmark v. State, 29 Ala. App. 405, 198 So. 149 (1940) (general reputation of those with whom defendant associated held inadmissible); Clark v. Dist. of Columbia, 34 A. (2d) 711 (Mun. Ct. App. Wash. D. C. 1943) (Vagrancy Act upheld as a valid police regulation to prevent crime); and State v. Grenz, 26 Wash. (2d) 764, 175 P. (2d) 633 (1946) (vagrancy conviction where defendant had obvious criminal intent).

24 264 Mich. 643, 250 N.W. 520 (1933); N. Y. Law Revision Commission Report, *op. cit. supra* note 23, at 601.

25 Mich. Comp. Laws (1934), c. 28, §16584-1; Public Acts (1931), Act 328, §167, providing that: "Any person who engages in an illegal occupation or business . . . shall be deemed a disorderly person;" and that "proof of recent reputation for engaging in an illegal occupation or business shall be *prima facie* evidence of being engaged in an illegal occupation or business."

26 264 Mich. 643, 667, 250 N.W. 520, 528 (1933); noted in (1934) 18 Minn. L. Rev. 806. The dissenting justices also suggested that the statute could be construed to mean that the evidence is "competent". All the judges agreed that were the statute construed to mean that proof of reputation, without more, establishes guilt, that it would be unconstitutional as a violation of due process. *Id.* at 661, 250 N.W. at 521.

In its discussions of the various interpretations which could have been put upon the statute, the Michigan court thus outlined four categories of weight which the legislature could have intended the evidence to have: (1) the evidence could be construed to be merely relevant, leaving the weight thereof to be determined by the trial court in each instance; (2) it could be admitted to prove that the defendant had such a reputation, but not to prove the crime charged unless corroborated by other substantial evidence; (3) it could be deemed a rebuttable presumption of guilt; or (4) it could be deemed conclusive of guilt.

The dichotomy between the second and third categories is based on the theory that in the former proof of the fact alone is not enough to take the case to the jury, while in the latter it is enough, and throws the onus of proof upon the defendant. Comment (1932) 30 Mich. L. Rev. 600; Note (1934) 19 Iowa L. Rev. 341; Note (1934) 18 Minn. L. Rev. 806.

principal case did not purport to create a statutory presumption, but, as already indicated, the court in effect construed the statute as meaning that proof of a reputation for selling liquor, if corroborated, was sufficient to take the case to the jury. Relevant to this issue are several United States Supreme Court cases dealing with statutory presumptions. In *Mobile, Jackson & Kansas City Railroad* v. *Turnipseed*,[27] the Court was called upon to construe and decide the constitutionality of a statute for civil cases which made evidence of injuries sustained by passengers or employees in the actual operation of railway trains or engines prima facie evidence of "want of reasonable skill and care on the part of the servants of the company in reference to such injury." In holding the statute not unreasonable and therefore valid, the Court said: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact presumed."[28]

Although the Court has never given an exact definition of the rational connection test,[29] Mr. Justice Cardozo, in *Morrison* v. *California*,[30] enunciated a corollary of perhaps greater content. A state statute forbade an alien who is neither a citizen nor eligible for naturalization to occupy land for agricultural purposes, and provided that where the indictment alleges the defendant's ineligibility, the onus of proving his citizenship or eligibility should devolve upon the defense. The Court invalidated the statute as contrary to due process of law. Mr. Cardozo said the limits upon a state's power to cast the burden of proof upon the defense are

27 219 U. S. 35 (1910).

28 *Id.* at 43.

29 Bailey v. Alabama, 219 U. S. 219, 238, 248 (1911) (statute making evidence of departure from employment without excuse or repayment after acceptance of advance salary prima facie evidence of fraud, held a violation of the 13th Amendment and the Peonage Act); Manley v. Georgia, 279 U. S. 1, 5, 6 (1929) (§28, Art. XX of Ga. Banking Act making "every insolvency of a bank . . . deemed fraudulent, provided the defendant may repel the presumption of fraud", held unreasonable and arbitrary and in conflict with the due process clause of the 14th Amendment); Tot v. United States, 319 U. S. 463 (1943) (Fed. Firearms Act, §2 (f) making it unlawful for any convict or fugitive to receive any firearm which has been shipped in interstate commerce, and creating a presumption from possession by such individual that the article was received in interstate commerce and that such receipt occurred after the effective date of the act, held invalid for lack of rational relation between the evidence and the fact proved). The cases are discussed in 5 Wigmore, Evidence (3d ed. 1940) §§2486, 2512; 4 Wigmore, Evidence (3d ed. 1940) §1956; 162 A. L. R. notes 499, 523; Note (1943) 56 Harvard L. Rev. 1324-1330; Note (1943) 17 So. Calif. L. Rev. 48-53.

30 291 U. S. 82 (1934). In Tot v. United States, 319 U. S. 463, 467-468 (1943), the court held that these were not two tests of validity of a presumption, but that the first is a controlling test and the second but a corollary to that test.

It should be noted that the rational connection test and its corollary are not restricted in application to statutory construction problems. The test has been applied with equal force to National Labor Relations Act cases, Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793, 804-805 (1945); and to a presumption set forth in instructions to a jury, Bollenbach v. United States, 326 U. S. 607, 609, 611 (1945) (held a presumption in instructions as "unsupportable as the one in *Tot* v. *United States*"). The test would therefore seem applicable to the situation in the *Richardson* case.